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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1004

UNITED STATES OF AMERICA, *ex rel.*
ANTHONY RUSSO,

Petitioner,

vs.

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Involved

1. Is not the determination of the United States Court of Appeals for the Third Circuit that the confession in question was neither physically nor mentally coerced amply supported in both fact and law by the record?

2. Is it not true that the decision of the court below with respect to the voluntariness of defendant's confession neither modifies nor misinterprets existing federal constitutional law?

Counter-Statement of the Case

[The State of New Jersey has set forth a statement of the essential facts relating to the confession of the petitioner Anthony Russo (hereinafter defendant) in its petition for writ of certiorari (No. 834) and respectfully makes it a part hereof.]

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

In both fact and law the determination of the United States Court of Appeals for the Third Circuit that the confession in question was neither physically nor mentally coerced is amply supported by the record.

Defendant asserts in his brief that "on the issue of voluntariness, the Court below found Russo's confession voluntary" (Rb26). The quoted language is not completely accurate, because the *finding* of voluntariness was made not by the appellate tribunal but rather by the jury at the time of the trial. That finding was affirmed by the Supreme Court of the State of New Jersey, by the United States District Court for New Jersey, and by the court below. The opinion of the latter tribunal sets forth in great detail the factual background relating to defendant's confession.

With respect to the question of alleged physical coercion, the decision below stated that the testimony was in conflict and that the issue was solely one of credibility. Thus the court held that it was bound to except the findings of the New Jersey Supreme Court and the federal district court.

The court below iterated that there had been a finding of no physical coercion by each of the courts which had considered the question and held that it was bound by that finding, citing, *inter alia, Haynes* v. *Washington,* 373 U. S. 503 (1963); *Culombe* v. *Connecticut,* 367 U. S. 568 (1961).

On the question of the supposed mental overbearing of the defendant, the court, after discussing the facts, did indicate that "interrogation of Russo under the circumstances [while in bed at the hospital] seems repugnant to concepts of fairness." That language is seized upon by the defendant in his petition in support of the claim that the court below misconstrued constitutional doctrine. What the defendant does not point to in his petition, however, is that after having stated the language quoted above, the court went on to discuss the counter-factors which, in the final analysis, prompted the statement that "on balance, we conclude that this inference [that defendant had feared the removal of an evidentiary bullet from his arm] outweighs any inference of coercion on these facts."

The defendant has made reference to several decisions of this Court relating to the general question of the voluntariness of a confession in the Fifth Amendment sense. He has failed, however, to show how the decision of the court below conflicts with any controlling pronouncement of this Court or, for that matter, of any other court.

POINT II

The decision of the court below with respect to the voluntariness of defendant's confession neither modifies nor misinterprets existing federal constitutional law.

Insofar as the question of the voluntariness of defendant's confession is concerned it is clear that the court below has neither modified nor misinterpreted any decision of this Court or of any court of appeals. It is apparent that what defendant is attempting to do here is to obtain new findings of fact, this time from the Supreme Court of the United States through the extraordinary writ of certiorari. There exists no basis for the issuance of the writ under the circumstances present.

CONCLUSION

For the reasons expressed herein it is respectfully urged that defendant has presented no appropriate basis for the issuance of a writ of certiorari and that, therefore, his petition should be denied.

Respectfully submitted,

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